No. 3854

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

2

FIRST NATIONAL BANK OF PARK RAPIDS (a corporation),
Plaintiff in Error,

vs.

R. F. PRAY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

WILLARD P. SMITH,
MARK J. WOOLEY,
Attorneys for Plaintiff in Error.

Topical Index

Page

STATEMENT OF CASE 1

SPECIFICATION OF ERRORS RELIED UPON 3

DEFENDANT'S LETTERS—

March 29, 1915 3

May 23, 1916 6

Nov. 26, 1918 10

Dec. 11, 1918 11

Aug. 8, 1919 13

Sept. 19, 1919 16

Oct. 4, 1919 17

July 22, 1920 19

ARGUMENT 20

Points:

I. Distinction between acknowledgments made before and after statute had run 21

II. Not necessary for defendant to make an express promise to pay 22

III. Application of the laws to the facts 30

IV. Estoppel 43

CONCLUSION 44

No. 3854

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIRST NATIONAL BANK OF PARK RAPIDS (a corporation),
Plaintiff in Error,

vs.

R. F. PRAY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This case comes up on writ of error issued to the United States District Court for the Southern Division of the Northern District of California from a judgment entered upon a nonsuit.

The White Stores Company, on March 22, 1915, made its promissory note in writing whereby it promised to pay to the plaintiff in error $4500 on March 22, 1916, with interest. Defendant in error, by endorsement guaranteed the payment of said note. Plaintiff in error filed suit herein February 24, 1921. More than four years had elapsed prior

to commencing suit, and plaintiff, to overcome the statute of limitations, alleged in his complaint, that defendant had requested plaintiff not to press payment of said note, and had assured plaintiff that an extension would enable defendant to secure from other sources money to apply on the said note, and that plaintiff, in compliance with such request, did not press the payment and extended the maturity of the note until September 19, 1919 (trans. pp. 3 and 4).

For a second cause of action, plaintiff, after setting up the jurisdictional facts and the note, alleges that within four years next preceding the beginning of this action, defendant in writing acknowledged said indebtedness and promised to pay the same (trans. pp. 4-5-6).

Defendant in his answer denies making any requests upon plaintiff not to press the payment of the note, alleges payment, sets up the statute of limitations (Secs. 337 and 339, Code of Civil Procedure of California), and denies that defendant at any time acknowledged said indebtedness or promised to pay the same (trans. pp. 8-13).

The note was offered and received in evidence (trans. p. 19).

Plaintiff thereupon offered in evidence certain letters covering a correspondence between plaintiff and defendant, beginning March 29, 1915, and ending June 26, 1920, for the purpose of showing that defendant had acknowledged the indebtedness in

writing and had also estopped himself by requests for extension and forbearance. All of these letters were ruled out by the trial Court to which rulings plaintiff duly excepted and filed a bill of exceptions and assignments of error. Defendant moved for a nonsuit which was granted. *All but one of the letters were written before the statute of limitations had run against the note.*

Specification of Errors Relied Upon.

The refusal of the Court to admit in evidence certain letters to wit:

Exception No. 1.

"March 29, 1915.

"Mr. W. M. Taber,

"President the First National Bank,

"Park Rapids, Minn.

"Dear Sir: Pursuant to your letter of March 22d, I am sending you herewith my check for $1500, and also the two notes of the White Stores Co. for $1500 and $4500 respectively. The first one named, we understand you are to cancel and keep on file with the other papers concerning this transaction.

"The payment on the $4500.00 note to be made from time to time as mentioned in a former letter.

"I would appreciate greatly if you could send me maps showing the locations of the various lands

described in the list which you sent me. Also advise me if the taxes are paid and the interest on the mortgages. Also advise me when the other mortgages expire.

"Please let me know all of the above before you transfer the Shore mortgages to me as I may prefer to let the matter stand as it is rather than assume the payment of the other mortgages, Also let me know in a general way whether you think it would be possible to renew the other mortgages providing they become due within a year.

"Thanking you for fixing this matter up for me, I remain,

"Yours very truly,

"R. F. PRAY."

Exception No. 2.

"Park Rapids, Minnesota, October 7th, 1915.

"Mr. R. F. Pray,

"Westwood, Calif.

"Dear Sir: Yours of the 1st inst., to our Mr. Taber is at hand, and in regard to the White Stores' note would say that I understand the conditions under which we are holding this note. Mr. Taber is still at the Rochester Hospital where he has undergone an operation for gall trouble. We expect him back here about the latter part of next week, as he seems to be getting along nicely.

"Yours very respectfully,

"M. C. SCHONEBERGER."

Exception No. 3.

"Park Rapids, Minnesota, February 21, 1916.

"Mr. R. F. Pray,

Westwood, Calif.

"Dear Sir: I have yours of February 16th in reference to the J. Shere matter, and replying will say that the $17,800 mortgage to Wyman-Partridge is recorded before our mortgage and makes no mention of our mortgage in any way, and unless we could show that they knew about ours it probably would come ahead of the $6,000 mortgage given to us by Mr. Shere, he told me that this mortgage could be taken up at any time, or that he could make almost any arrangements with them.

"I am writing Mr. Shere to-day concerning this matter and asking him to have it attended to; that is, to have them either release the $17,800 mortgage and to make a new one, or give us an agreement whereby the $6000 mortgage would be taken care of before they look to their mortgage. I do not know for sure just what he can do. We are very anxious [34] indeed, to have this matter cleaned up, and of course if you can now arrange to pay the balance of the $5,000 mortgage, we will assign this mortgage to you, and do our best to get a second mortgage made on the property.

"Yours very respectfully,

"W. M. TABER."

"I have not been able to get any interest out of Shere. The $4500 note will be due Mch. 22d and I shall be very glad to have it taken up."

Exception No. 4.

"Westwood, Cal., May. 23, 1916.

"Mr. W. M. Taber,

"First National Bank,

"Park Rapids, Minn.

"Dear Sir: In reply to your letter of May 18th, I wonder if it would not be possible in some way to have Mr. Shere adjust the mortgage in some way with Wyman-Partridge Co. by cancelling the old one and giving a new one to have the one they give you take precedence over it. It must have been Mr. Shere's intention to have the one they give you filed before the one for Wyman-Partridge. This may seem like an unusual procedure, but Mr. Shere is an unusual man and does things in an unusual manner and I will ask you to take the matter up along this line and see if you cannot get it fixed as I have suggested. What I mean is this: By endorsement J. Shere is responsible for the notes and to escape some of the liability on this, he might be able to make the trade.

"Is there any reason why you could not put in the claim on the notes which the White Stores Co. gave you in the amount of $6,000 as the matter probably stands that way on their books. Any dividends paid would, therefore, be on the larger amount and it would make it so much less for someone to make up the difference.

"With the good times on the iron range I think the White Stores Co. will pay out much better than intimated in your letter, especially if put under a

competent manager and if we could get the mortgage adjusted as suggested and claim filed for $6000 instead of $4500, it would leave the amount to be made up very considerable less than now appears. The $1500 which I sent you a year ago could be kept as a credit to my personal account if you could handle it in this way. There is certainly no evidence to show that the White Stores Co. took up the $1500 note.

"I am not in position at this time to take advantage of the offer made in the last paragraph of your letter, but I would still be glad if you could give me the valuation of the land upon which Mr. Shere gave the mortgage, as asked for in a former letter.

"Yours truly,
"R. F. PRAY."

Exception No. 5.

"June 1, 1916.

"Mr. R. F. Pray,
"Westwood, Cal.

"Dear Sir: I have yours of May 23d in reference to the White Store Company's note, and reply will say that I feel very sure that Mr. Sheerer is not able to get the Wyman-Patrich people to release their mortgage. They promised to let me hear from them before June 1st but up to this I have heard nothing from them. On a separate sheet I give you as near as I can the valuation of the lands that we

have in the six thousand dollar ($6,000) mortgage. I am very anxious, of course, to get this matter cleaned up. I am ready and willing to do anything I can to help you but as you know, of course, when the loan was made, it was made on the stripe of your endorsement and it is really you that we are looking to for our payment and I would appreciate it very much if you would arrange at this time to take the loan up as it is due and we, of course, ought to have our money. If you cannot take it all up at this time I would suggest that you pay us what you can and I will take a new note from you bearing interest at the rate of six per cent and will hold the White Stores notes as collateral security to your note.

"I enclose you, herewith, a few blanks and you can fill them out payable to us in such amounts as you will be able to take care of and return to me and we will do our best to get what we can out of the White Store Company's assets on the strength of the six thousand dollars ($6000) notes.

"I enclose you a little assignment or statement concerning the fifteen hundred dollars we now have and if satisfactory you can sign and return to me so that I can file a claim for the six thousand dollars ($6000) and interest.

"I am very sorry, indeed, that this has fallen so heavily on you, but see no other way out of it at the present time.

"Yours truly,

"_____,

"President."

Exception No. 6.

"November 19th, 1918.

"Mr. R. F. Pray,

"Westwood, Cal.

"Dear Sir: We have been hoping we would be able to get something more out of the trustee in the White Stores Company but now have absolutely given up all hopes. We are still holding a loan of $4500 dated March 23, 1915, and upon which on May 17th, 1918, we received from the trustee $993.21 which has been endorsed on the note, leaving a balance of $3506.79 and interest.

"I always feel it is unnecessary to make expense if it can be avoided and at this time am going to make you this proposition, Mr. Pray. You send us one-half of the balance of this note without taking into consideration the interest, that is $1753.40 and we will cancel your name from the back of the note which entirely releases you. I feel that this is more than meeting you half way and trust we will receive a remittance as above stated by return mail. This holds good only that you do so this month.

"We would be willing to take Liberty bonds if you prefer.

"Yours truly,

"_____,

"Pres."

Exception No. 7.

"Westwood, Cal., November 26, 1918.

"W. M. Taber,

"Pres., First National Bank,

"Park Rapids, Minn.

"Dear Sir: I have received your letter of Nov. 19th in regard to the notes of the White Stores Co. and wish to thank you for the kind manner in which you have referred to them.

"By same mail I also had a letter from the new trustee of the White Stores Co. in regard to final hearing, and have written my attorneys, Courtney & Courtney, for a little further information. I should hear from them in a few days and will then communicate with you.

"With personal regards, I remain,

"Very truly yours,

"R. F. Pray."

Exception No. 8.

"Dec. 2d, 1918.

"Mr. R. F. Pray,

"Westwood, Calif.

"Dear Sir: I am just in receipt of yours of November 26th and, as stated in my former letter, we will be glad to have you give this due consideration at as early a date as possible and advise us.

"Kindly give up your final answer between now and the 15th of this month.

"With personal regards, I am,

"Very sincerely yours,

"W. M. Taber."

Exception No. 9.

"Westwood, Cal., Dec. 11, 1918.

"Wm. M. Taber,

"Pres., First National Bank,

"Park Rapids, Minn.

"Dear Sir: Referring to your recent correspondence in regard to the White Stores notes. I have just to-day received a letter from Courtney & Courtney, attorneys at Duluth, saying that there was in the hands of trustee, considerable amount for distribution to the creditors of that company, and the distribution would soon be made.

"When this is done, I should be very glad to hear from you again. Please understand I do not wish to stall this matter off, but believe it is only proper to apply the distribution which you receive on these notes before making settlement.

"Very truly yours,

"R. F. Pray."

Exception No. 10.

"Park Rapids, Minnesota, Dec. 16th, 1918.

"Mr. R. F. Pray,

"Westwood, Calif.

"My Dear Mr. Pray: I have yours of December 11th in reference to the White Stores Company note and replying will say this. Of course, you realize I am very anxious, indeed, to get this matter cleaned up and off our books.

"If you care to make remittance as per my former letter at this time, I will do this. I will agree

to give you one-half of any further amounts that we receive from trustee. I should think this would be quite satisfactory to you.

"Kindly let me hear from you concerning this and oblige.

"Yours truly,
"W. M. TABER,
"President."

Exception No. 11.

"Park Rapids, Minnesota, 7/31/19.

"Mr. R. F. Pray,

"Westwood, Cal.

"My Dear Sir: The First National Bank of Park Rapids has turned over to me, for adjustment, a note upon which you appear as a guarantor, dated March 22d, 1915, and upon which there remains still due, the sum of $3506.79 and interest.

"You are of course familiar with the entire matter and there is no necessity for my going into details, except to advise you that the Bank feels that they must do something to protect its interests. I am advised by the Receiver of the White Stores Company that it will be some time before they can close up this matter, as they have sued the Red River Lumber Company and expect to proceed on the double stock-holders liability. However, I am instructed to advise you that to clean this matter up, the Bank will accept the face of the note and will return to you all dividends that they receive in connection with the receivership.

"In the event that you do not see fit to accept this proposition, the Bank have instructed me to sue on the note. This would be distasteful to the Bank, as well as the writer and I trust such course will not be necessary.

"Please let me hear from you at your earliest convenience. With kindest personal regards to yourself and family, I am,

"Very Truly Yours,
"Mark J. Wooley."

Exception No. 12.

"Westwood, Calif., Aug. 8, 1919.

"Mr. Mark J. Woolley,

"Park Rapids, Minn.

"My Dear Mark: I have your letter of July 31st relative to the White Stores note given to the First National Bank, Park Rapids, and bearing my endorsement.

"Last spring Mr. Taber wrote me that the balance of the note was about $3500.00 and that if we would send one-half of this amount, he would cancel the entire obligation against the White Stores and against me as an endorser. At that time I wrote Mr. Shere and told him about this offer and asked him to pay half of this settlement, and if he did, I would pay the other half and thus wipe this note out. Mr. Shere did not respond to this letter and I have written him again on the subject.

"This whole affair of the White Stores Co. has been a most unfortunate thing for me as I lost

$20,000.00 thru this investment and never felt I was responsible for it, morally, as I had nothing to do with the management of the stores.

"In addition to this loss I have already sent Mr. Taber $1500.00 and am very anxious, indeed, to see it cleaned up, as it certainly has been a source of worry and anxiety to me.

"Would you not kindly ascertain Mr. Shere's address and take the matter up with him direct and see if you cannot get half of the amount that Mr. Taber offered to settle for, and I will send the other half and get it out of the way?

"Hoping you will do this for me, I remain,

"Very truly yours,

"R. F. PRAY."

Exception No. 13.

"Park Rapids, Minnesota, 8/29/19.

"Mr. R. F. Pray,

"Westwood, Cal.

"My Dear Mr. Pray: I have a letter from J. Shere dated the 20th inst. in reply to a letter from me written after I had received your letter, in which he advises me that he has written you that he can do nothing at this time." [40]

"I have again taken the matter up with Mr. Taber and he tells me that he wrote you Nov. 19th, 1918, making you the proposition you suggested in your letter, but that same was contingent upon an acceptance during the month of Nov. 1918, and

inasmuch as you did not see fit to accept same, he now advises me that he would not settle on that basis.

"You will understand that I have no discretion in this matter, the Bank simply renews the offer I made you in my former letter and that is contingent upon an early adjustment.

"I cannot help but feel that Shere is not doing the square thing with you, I see him frequently, he is located in the Andrus Building two doors from my father's office and I believe that he is making money, but of course has no tangible assets.

"The Bank looks to you as a responsible party for this money, anything that I could do for you in getting a settlement out of Shere I would be glad to do, but the Bank insists upon a settlement in the immediate future or they will insist upon an action being started to recover the total amount due with interest.

"I appreciate your position in this matter and realize that the whole affair was an unfortunate one, but you realize that banks look at the business, not the human side of questions.

"I shall greatly appreciate an early reply and trust that same will be adjusted without the unpleasantness of having to institute an action.

"Very truly yours,

"Mark J. Woolley."

Exception No. 14.

"Westwood, Calif., Sept. 19, 1919.

"Mr. Mark J. Woolley,

"Park Rapids, Minn.

"Dear Sir: Since our last correspondence, I have tried very hard to get Mr. Shere to pay his half of the remaining portion of the note due the bank at Park Rapids, but without any success whatever.

"Inasmuch as the bank insists upon its legal right to sue the endorsers of the note, for which, however, I do not blame them, I suggest that they go ahead and sue either Mr. Shere or myself, or jointly, and ascertain what the outcome will be.

"Of course, I am very sorry to have this action taken but see no way in which my legal rights may be determined any other way.

"Very truly yours,

"R. F. Pray."

Exception No. 15.

"Park Rapids, Minnesota, 9/29/19.

"Mr. R. F. Pray,

"Westwood, Cal.

"Dear Sir: I have your favor of the 19th inst. and note what you say in regard to being unable to secure any kind of a settlement out of J. Shere.

"In case I should be able to secure a note from Mr. Shere running to you, for one-half of the amount due, would you in that case adjust this matter with the Bank?

"If you are interested in this proposition advise me and I will see what I can do. In any event please let me know what you think about same.

"Yours Truly,

"MARK J. WOOLLEY."

Said letter of October 4, 1919, reads as follows:

"Westwood, Calif., Oct. 4, 1919.

"Mr. Mark J. Woolley,

"Park Rapids, Minn.

"Dear Sir: In reply to your letter of Sept. 29th:

"I would not be satisfied to pay half the note with the understanding that Mr. Shere would give his note for the balance, as I am afraid Mr. Shere would not be in a position to pay the note when it became due. I had thought you were proceeding to put this matter in court, so I referred the matter to my attorney out here and he thinks it will be satisfactory, in order to determine just what my liability is, to have suit brot on the note.

"Sorry I cannot see my way on account of the reason given to take up Mr. Shere's proposition.

"Yours truly,

"R. F. PRAY."

Exception No. 16.

"Park Rapids, Minn., June 26th, 1920.

"Mr. R. F. Pray,

"Westwood, Cal.

"My dear Sir: Mr. Taber has just been in to see me again in regard to the notes he holds in which you are interested.

"He has just figured up the total amount, including interest, and the same amounts to about $5,300 which does not figure all of the interest that is due. However, estimating it upon a basis of $5,000 Mr. Taber requested that I again write you making you the following proposition:

"That the Bank will accept from you and give you a release from all further liability, the sum of $2,500, and pay you one-half of any amounts that may be realized from dividends yet to be paid from the trusteeship of the White Stores Company.

"He would rather clean this matter up with you in this way than to be forced to go to the expense and trouble and the incidental unpleasantness of the institution of a law suit. He tells me that of course you were aware of the fact that at the time this money was loaned that he looked to you as the responsible individual in the transaction.

"I trust that you can see your way clear to adjust this matter on this basis and we shall be very glad if you so desire to institute an action in the State of Minnesota to recover from Mr. Shere, who, I think, is probably making some money. But in any event kindly give me a definite answer as to your intention in regard to adjusting this matter so that there will be no question as to what course the Bank must pursue.

"Very truly yours,

"Mark J. Woolley."

Said letter of July 22d, 1920, reads as follows:

"Westwood, Calif., July 22, 1920.

"Mr. Mark J. Woolley,

"Park Rapids, Minn.

"My Dear Mr. Woolley:

"Since receiving your letter of June 26th in regard to the White Stores notes, which I endorsed, I have consulted with my attorneys here and they advise me to let the matter go to suit, as in that way my legal rights will be fully protected in the matter.

"I appreciate very much the lenient manner in which Mr. Taber has treated this matter, and am sorry I will not be in position to take advantage of his kindness. I think possibly the best for all concerned will be to let the matter go to trial.

"Hoping you are enjoying the best of good luck in your practice and in your business, I remain,

"Yours truly,

"R. F. PRAY."

Exception No. 17.

Said Court erred in granting a nonsuit to defendant as set forth in plaintiff's bill of exceptions, Exception No. 17 plaintiff then and there duly excepted.

Argument.

PLAINTIFF IN ERROR CLAIMS THAT THE LETTERS SHOULD HAVE BEEN RECEIVED IN EVIDENCE AS WRITTEN ACKNOWLEDGMENTS OF THE INDEBTEDNESS.

The law in regard to acknowledgments sufficient to take a case out of the operation of the statute of limitations is found in Sec. 360 of the Code of Civil Procedure of California, which reads as follows:

> "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby."

Federal Courts are governed by the rulings of the State Courts in the interpretation of state statutes. This rule is very clearly laid down by Morrow, J., in Bullion v. Hegler, 93 Fed. 890, where he says at p. 892:

> "For the determination of the question at issue in this case, we must therefore look to the decisions of the Supreme Court of California", citing Bauserman v. Hunt, 147 U. S. 647; Metcalf v. Watertown, 153 U. S. 671; Campbell v. Haverhill, 155 U. S. 610.

We shall therefore confine our argument to the California cases on the question of what constitutes a sufficient acknowledgment to take the case out of the statute.

Point I.

DISTINCTION BETWEEN AN ACKNOWLEDGMENT MADE BEFORE THE CLAIM HAD OUTLAWED AND ONE MADE AFTER THE STATUTE HAD RUN. THE LETTERS WHICH WE OFFERED WERE, WITH ONE EXCEPTION, ALL WRITTEN BEFORE THE STATUTE HAD RUN.

There is a well recognized difference between an acknowledgment which continues an obligation and one which revives it. In the former case it can be continued by an acknowledgment but after it has lapsed it must be revived by a new promise. While there is some confusion in the cases on this subject, we think it has arisen from not carefully bearing this distinction in mind.

In Powell v. Patch, 166 Cal. 329, a note had outlawed and debtor wrote "What is the state of my indebtedness to you regarding the lot you bought? The money I advanced to N. was intended to offset it, but let me know the condition". This was held not sufficient acknowledgment to take the indebtedness out of the statute. The Court said at p. 331:

> "It was written *after the bar of the statute had attached* and must be viewed in the light of that fact, for there is a *great difference* to be put upon the construction of a letter written *before* and one prepared *after* the running of the statute."

In So. Pac. v. Prosser, 122 Cal. 413 at p. 415, the Court said:

> "There is a great difference between the construction to be put on a letter written a short time after the debt has been contracted and one written after the debt is already barred".

We desire to point out clearly to this Court this distinction because it was due to our inability to properly elucidate this point that this case is in this Court. Our contenton on the trial was, that the acknowledgment here having been made while the indebtedness was still existing, the debt had been continued and no express promise was necessary to revive it. While the Court below held that an express promise to pay must be shown and further held that our letters failed to contain any such express promise and that therefore we had failed to make out a case.

II.

IT WAS NOT NECESSARY FOR THE PLAINTIFF IN ERROR TO SHOW THAT DEFENDANT HAD MADE AN EXPRESS PROMISE TO PAY THE NOTE.

In So. Pac. v. Prosser, 122 Cal. 413, the debtor wrote:

> "Dear Sir: Referring to the traction engine at Auburn owned by me and mortgaged to the S. P. Co., I have not been able to sell it—now sir, can't you give me a chance to pay you in work? The company employs many men, and if you choose, you can procure some employment for me. I have a sick family and am hard up personally and need work and want to pay you besides W. S. Prosser."

This was held to be a sufficient acknowledgment. At p. 415 the Court said:

> "The distinct and unqualified admission of an existing debt—contained in a writing signed

> by the party to be charged and without intimation of an intent to refuse payment thereof, suffices to establish the debt to which the contract relates as a continuing contract and to interrupt the running of the Statute of Limitations against the same. From such an acknowledgment, the law implies a promise to pay."

We will point out later that defendant admitted the existence of the debt and never made any intimation of any intent to refuse payment. Defendant wrote eight letters to plaintiff in reference to this note and there isn't a single letter in which there is an expression of an intention not to pay. How could he write eight letters on this subject without its constituting an acknowledgment? It would certainly have to be very diplomatic writing to so conceal the main thought that was in the mind of both plaintiff and defendant. Plaintiffs keeps writing for the money and eight times defendant replies with some request for delay.

In Concannon v. Smith, 134 Cal. 14, at p. 20:

> "The statute does not prescribe any form in which the acknowledgment or promise shall be made. Whether these writings constitute a sufficient acknowledgment or promise is therefore a question of law. The important thing is, that it shall be contained in some writing signed by the party to be charged thereby. The expression 'contained in some writing' clearly indicates that it is not essential that the acknowledgment or promise should be formed such as 'I hereby acknowledge' or 'hereby promise'. It is sufficient if it shows that the writer regards or treats the indebtedness as subsisting, and from this acknowledgment the law implies a promise to pay and for which

promise the old debt is a sufficient consideration."

This doctrine was approved in Moore v. Gould, 151 Cal. 723, at p. 727, the Court said:

> "Each of these instruments constituted a renewal of the note and mortgage—furthermore, each of them contained an acknowledgment of the debt and thus operated to start a new period of limitation."
>
> McCormick v. Nofziger, 10 Cal. App. 241, at p. 44.

In Tuggler v. Miner, 76 Cal. 98, a note was endorsed

> "6/10/79 on my return from New York I will settle the above a/c"; "4/10/81. This agreement renewed this day",

and the Court held that the writing took it out of the statute and further held that "settle" meant to pay.

In Minifie v. Rowley, 202 Pac. 673 (Cal. Sup.) (1922), action on a promissory note—matured January 4, 1910. On January 6, 1914, Rowley Co. made payment of interest accompanied by a letter reading:

> "San Francisco, Cal.
> January 6, 1914.
>
> Jones & Given,
> 8th Floor Crocker Bldg.,
> San Francisco, Cal.
> Gentlemen:
>
> Herewith check 8889 amount $100 in payment 3 months interest due you on $10,000 loan. That is to say—interest from Oct. 3, 1913 to Jan. 3, 1914.
>
> Very truly yours,
> The Rowley Investment Co., Inc."

This was held to be a sufficient acknowledgment to take it out of the statute. At page 675, the court said:

> "However it is unnecessary for the letter itself to amount to a written promise or acknowledgment of the debt due."
>
> "The payment made and entered upon the open book account tolls the statute."
>
> Furlow v. Balboa, 62 Cal. Dec. 290 (1921).

In Curtis v. Holee, 61 Cal. Dec. 123 (1921); 195 Pac. 395, foreclosure of a mortgage—the court held that an extension agreement endorsed on note (secured by mortgage) constituted an acknowledgment of the mortgage and debt secured thereby:

> Lennon, J., said: "If the grantee acknowledges the existence of the debt in writing with sufficient certainty, that is, sufficient to take the debt out of the operation of the statute, *an actual promise to pay is not necessary.*"
>
> "A writing signed by the party to be charged, containing an acknowledgment of the existence of the indebtedness is sufficient to take such indebtedness out of the statute." Bledsoe, J.
>
> In re Blankenship, 220 F. 395.
>
> Union Oil Co. v. Purissima H. Oil Co., 181 Cal. 479-480 (1919).

It will be noted that the foregoing cases are very recent decisions of the Supreme Court and that they seem to extend the doctrine. Minifie v. Rowley, decided in January, 1922, holds that the acknowledgment may be by conduct as well as words.

Furlow v. Balboa, decided in 1921, held that the mere entry of payment upon the open book account tolled the statute.

Curtis v. Holee, decided in 1921, holds that an extension agreement endorsed on the note takes the mortgage out of the statute. All of these recent cases hold that an express promise to pay is not necessary.

In Foster v. Bowles, 138 Cal. 346, at p. 351, the Court said:

> "The trust deed declared, 'And whereas there is now existing a mortgage for the sum of $20,000 against said tract hereinbefore described' and provided for payments on account of this mortgage and thus expressly acknowledged the existence of the indebtedness as well as of the mortgage. Indeed any acknowledgment of the mortgage was an acknowledgment of the indebtedness secured thereby. It was not necessary that the respondents should promise to pay the indebtedness in order to establish a new date for the statute to begin running as to the mortgage. All that was required was a plain and distinct acknowledgment in writing of the existence of the mortgage."

Foster v. Bowles, 138 Cal. 346, at p. 351, was approved in Worth v. Worth, 155 Cal. 599, at p. 602—there plaintiff's attorney shortly before a mortgage was about to outlaw wrote to defendant calling his attention to that fact and asked for a renewal or payment to which defendant replied:

> "In response to the mortgage referred to in yours of recent date. I see no necessity of making a new mortgage. An agreement extending the old mortgage will have the same

effect, won't it? However if you must have a new mortgage, will make it. Nothing ever outlaws with me. Truly yours, C. Worth."

At page 602 the Court said:

"Counsel for defendant have not pointed out why this was not a sufficient acknowledgment in writing to take the case out of the operation of the statute of limitations and we can conceive of no reason why it did not have such effect."

"The promise referred to is not necessarily a promise to pay the debt. A promise not to plead the statute comes equally within the language used and will equally operate to prevent the bar of the statute."

State Loan v. Cochrane, 130 Cal. 245, at p. 251.

In Chaffee v. Brown, 109 Cal. 211, where the mortgagors signed with the mortgagees an instrument releasing from the mortgage a part of the incumbered property and referring therein to the indebtedness secured by the mortgage, such instrument constituted an acknowledgment of the indebtedness by which the running of the statute of limitations upon the indebtedness was interrupted.

"Nor do we think that the plea of the statute of limitations was sustained; the action was begun July 12, 1893, and as late as the month of March previous the appellants had signed with the plaintiffs, the instrument releasing from the mortgage a part of the incumbered property; such instrument referred to the alleged indebtedness in such terms as, fairly considered, constitutes an acknowledgment thereof. The running of the statute was thus interrupted."

This was approved in McDonald v. Randall, 139 Cal. 246, at p. 252.

In Fielding v. Iler, 39 Cal. App. 559 (1919), a letter written to the mortgagee two days before the expiration of the statutory period acknowledging the existence of the indebtedness was sufficient to toll the statute although the letter contained no promise to pay it.

In the case of Minifie v. Rowley, 202 Pac. 673, at p. 675, the Court held that:

> "There may be an acknowledgment by conduct, as well as by words. In the case of part payment for instance, of either principal or interest, the conduct itself has always been deemed, unless accompanied by qualifications, an unequivocal act of a subsisting contract or liability from which a new contract to pay the debt must be inferred."

So here we find a considerable correspondence from plaintiff calling for payment and defendant asking for consideration and delay but never repudiating the obligation. There was surely here an "acknowledgment by conduct" as much so as in Minifie v. Rowley.

> "Each check [letter] was an acknowledgment of something. But of what? The answer is, of $45 as interest."
>
> Clunin v. First Fed. Trust Co., 35 Cal. App. Dec. 746, at p. 747.

> "It is not essential that the acknowledgment or promise should be formal but it is sufficient if the writer regards or treats the contract as

subsisting, from which a promise may be implied."

Cotcher v. Barton, 33 Cal. App. Dec. 141, at p. 144 (1920).

In the Auzerias v. Naglee, 74 Cal. 60, at p. 68, the court said:

"Defendant paid to the plaintiff on the account rendered him the sum of $1000 which is evident by the receipt on the back of the account in the handwriting of the defendant (except the signature thereto) as follows: Received December 8th, 1880, of H. Naglee, $1000 in account of the within E. Auzerias Ldg. partner."

This was held to be a sufficient acknowledgment.

It would seem from a consideration of the foregoing cases that a promise to pay was not necessary. By that we mean an express promise to pay. However, from the acknowledgment, the law implies a promise to pay and that is the only promise that is necessary.

In Biddell v. Brizzolari, 56 Cal. 374, at 380, the Court said:

"The point to be resolved in all cases is, whether the acknowledgment or promise is a mere continuation of the original promise grounded upon presumption of payment or whether it is a new contract springing out of and supported by the original consideration. We think that Sec. 360 of the C. C. P. does not establish a different rule in this state. The purpose of that section is to establish a rule, not with respect to the character of the promise

> or acknowledgment from which a promise may be inferred, but with respect to the kind of evidence by which the promise or acknowledgment shall be proved."

The Court held that the agreement made by a third party to pay the mortgage did not revive it as to defendant.

III.

APPLYING THE LAW WHICH WE HAVE SET FORTH IN THE FOREGOING TO THE FACTS IN THIS CASE, AN EXPRESS PROMISE TO PAY WAS UNNECESSARY AS DEFENDANT SUFFICIENTLY ACKNOWLEDGED THE DEBT TO TOLL THE STATUTE.

A correspondence, between plaintiff and defendant, covering this note *and nothing else as there was no other indebtedness* (trans. p. 42), began March 29, 1915, and extended to July 22, 1920. The note matured March 22, 1916 (trans. p. 19). This action was commenced February 24, 1921. In the letter of March 29, 1915, defendant speaks of "the payment on this $4500 note to be made from time to time". As the note itself accompanied the letter it would seem that defendant expected some indulgence (trans. p. 46).

In the letter of May 23, 1916 (trans. p. 46, Exception No. 4 he says:

> "If we could get the mortgage adjusted as suggested etc., it would leave the amount to be made up [by me] very considerably less than now appears."

It appears that defendant expected to have the liability lessened by dividends from the trustees in bankruptcy of the White Stores Company and that subsequently on May 15, 1918, a dividend of $993.21 was so paid (trans. p. 6).

In defendant's letter of November 26, 1918 (trans. p. 53, Exception 7) he says:

> "I have received your letter of Nov. 19th in regard to the notes of the White Stores Co. etc. I should hear from my attorneys in a few days and will then communicate with you. R. F. Pray."

This was in reply to a request to pay this $4500 note and in fact an acknowledgment of it.

In defendant's letter of December 11, 1918 (trans. p. 54, Exception No. 9) he says:

> "Westwood, Cal., Dec. 11, 1918.
>
> "Wm. M. Taber,
> "Pres., First National Bank,
> "Park Rapids, Minn.
>
> "Dear Sir: Referring to your recent correspondence in regard to the White Stores notes. I have just today received a letter from Courtney & Courtney, attorneys at Duluth, saying that there was in the hands of trustee, considerable amount for distribution to the creditors of that company, and the distribution would soon be made.
>
> "When this is done, I should be very glad to hear from you again. Please understand I do not wish to stall this matter off, but believe it is only proper to apply the distribution which you receive on these notes before making settlement.
>
> "Very truly yours,
> "R. F. Pray."

This is surely an acknowledgment of the indebtedness without any indication that he would not pay it or without any condition attached. It will be noted that there is no denial of the indebtedness in any of the letters.

Where a surety on a note in response to demands for payment wrote that the bankruptcy case of one of the principals had not yet been settled and for him to get all he could out of him, and that he, the surety, would be home in two weeks and then see the payee, it was held sufficient to take the note out of the statute.

Woodsville Bank v. Ricker, 82 Atl. 2 (Vt.).

If these two letters of November 26, 1918, and December 11, 1918, do not constitute an acknowledgment of the debt it is difficult to see what they mean. Defendant is called upon by plaintiff to pay the note and he writes, "I have received your letter in regard to the notes of the White Stores Co.—I also have a letter from the trustee [in bankruptcy] and have written my attorneys for a little further information", and concludes "I should hear from them in a few days and will then communicate with you". Here, again, there is no repudiation, no conditional offer, nor any express promise, but as we have shown, no express promise is necessary. He could not have written that letter in response to a demand for payment without making a complete acknowledgment. There can be no middle ground. These letters are either an acknowledgment or a repudiation of the debt. We fail to see where there

is any attempt on the part of the defendant to repudiate the debt. He repeatedly refers to the note and concludes "I will then communicate with you". This is a response to a demand for payment. After getting further information regarding the probabilities of dividends from the trustee in bankruptcy I will communicate with you. I cannot tell now just how much I shall have to pay because it is uncertain how much will be paid out in bankruptcy but when I can find out what the bankruptcy dividends will reduce the debt to then I will take up with you the payment of the note. That is what he meant. It was a complete and unequivocal acknowledgment of the debt. He didn't say "I don't owe it. I wont' pay it." But he asks for time and for what purpose? Merely to find out whether or not the assets of the principal (he being a surety), which were being administered in the bankruptcy court would not realize enough to relieve him from a portion of his responsibility.

Now, looking at defendant's letter of December 11, 1918 (trans. pp. 54 and 55): "Referring to your recent correspondence in regard to the White Store notes" (which he had been asked to pay) there is a "considerable amount for distribution to the creditors of that company and the distribution will soon be made". ($993.00 had been distributed seven months before (trans. p. 6). "When this is done (distribution by trustee in bankruptcy) I should be very glad to hear from you again. Please understand I do not wish to stall this matter off but be-

lieve it only proper to apply the distribution which you receive on these notes before making settlement. R. F. Pray". What does he mean? I am anxious to have the principal pay this note or a part of it. As soon as I can find out what my part is I will settle with you for the balance. Since he wishes the matter delayed until the assets of the principal are distributed in bankruptcy *before making settlement,* does this not imply that after distribution is made, or after he has learned what the distribution will be, he will *make* settlement? If a creditor demands payment of a debt and the debtor says wait until a certain event happens and I will then make settlement, can this mean anything else other than that the debtor will pay? Making settlement means nothing else than paying. He did not insist that he will not pay until distribution is made but said he *"believes it only proper* to apply the distribution before making settlement". Is this all mere talk with no meaning? What is he talking about? What is the occasion for his writing these letters? The creditor is demanding payment and the debtor is asking his indulgence—*not repudiating* the obligation. As we have pointed out, the debtor cannot very well talk or write about the obligation without either acknowledging it or repudiating it. What third ground could he stand on? He surely does not convey the impression that he repudiates it. He writes about "making settlement". That surely does not mean repudiation. There is no conditional offer. He does not say "I will pay a certain amount on certain conditions", but he does say, "wait until I get certain

information". "I do not wish to stall the matter off but believe it is only proper to apply the distribution first". He doesn't say that he will not pay until distribution is made, and now when his creditor has indulged him, it comes with ill grace from him to say that the request for indulgence was not an acknowledgment. It would not require any considerable stretch of the imagination to interpret his statement that "before making settlement" he would like to ascertain the amount of dividends available to mean that after he had found out what that disbursement would amount to that then he would "settle". And as we have pointed out, the word "settle" under such circumstances cannot mean anything else but "pay". The Supreme Court so interpreted the word "settle" in Tuggler v. Miner, 76 Cal. 98, so that we have then a promise to pay. The fact as to what would be disbursed was easily ascertainable and it could not be reasonably expected that debtor could or would try to postpone settlement indefinitely but was merely seeking a reasonable postponement in order to obtain this information.

Quite a similar acknowledgment is found in the case of Winchell v. Hicks, 18 N. Y. 558. There one Bowman had the money and was the principal for whom the other defendants were sureties. Before the statute had run, the plaintiff called on Hicks, one of the sureties, who directed him to get it out of Bowman, the principal. The Court said at page 563:

> "Did he not substantially acknowledge the debt, and direct the same request to be made to

> Bowman to pay the interest as did his co-surety? Was not his declaration a sufficient recognition to bind him? You must get it out of Bowman, in other words, 'I am a surety only, and tho liable and willing to pay, if the principal fails so to do, I wish you to request him to pay it and if he refuses or fails, you can call on me again.' Let it be remembered that this declaration or request was made at a time when the note could have been collected of him by legal process, and when a resort to such process would undoubtedly have been made if he had repudiated or refused absolutely to pay or to recognize his liability upon it. But so far from evincing any such intention, he requests, or assents at least, that the agent should call upon Bowman and receive a payment which was for his own benefit, and which, most probably, prevented the prosecution of a suit for its recovery, in which an answer of the statute could not have availed him, could his design have been otherwise than to renew the note, and thus prolong his own liability in the hope that Bowman would eventually pay the whole debt?—neither Hicks nor Tanner should now be permitted to take advantage of a delay which was occasioned by their own acts and declarations, and which was granted for their sole benefit and accomodation. They requested that Bowman should do what was obligatory upon them, and his act in compliance with that request was as much their act as if they had stood by and made the request personally."

So here defendant, at a time when if he had repudiated the obligation it could have been collected from him, requested that the money should be collected from the estate of the principal and thereby secured an extension beyond the period of

the statute. He was willing to have his own liability prolonged in the hope that the dividends from the trustee in bankruptcy of the White Stores would wipe out his obligation. By the request that he made, he acknowledged the obligation and prevented plaintiff from pursuing him personally at a time when he could have been made to pay it. Should he be permitted to take advantage of a delay which was occasioned by his own acts and which was granted for his sole benefit? To permit him so to do would be an injustice.

In defendant's letter of August 8, 1919 (trans. p. 57, Exception No. 12) he writes:

> "I have your letter of July 31, relative to the White Stores note given to the First National Bank of Park Rapids and bearing my endorsement—am very anxious to see it cleared up—see if you can get ½ from Mr. Shere [the other indorser] and I will send the other half and get it out of the way. R. F. Pray."

This was a clear acknowledgment of the debt as he refers to the *"note given to the First National Bank of Park Rapids and bearing my endorsement"*. Nothing could be clearer than that and he follows "am very anxious to see it cleared up".

> "When payment was demanded of defendant who said, "I supposed it was paid by White by an arrangement, tell your father to put White up to pay it, if he does not I shall have to pay it".
>
> Hayden v. Johnson, 26 Vt. 768.

This was held sufficient to take the debt out of the statute.

It is not necessary that he state the amount and date of the note. It was sufficiently identified as there was no other indebtedness (trans. p. 42).

> "Where the debt is certain and liquidated nothing need be said in the acknowledgment as to its amount. Words wholly insufficient when applied to an unsettled account may have a different signification as to a debt reduced to a certainty."
>
> 1 Wood on Limitation, p. 375 (4th Ed.).

In defendant's letter of September 19, 1919 (trans. p. 60, Exception No. 14) he speaks "of the note due the bank at Park Rapids" and suggests "that they go ahead and sue either Mr. Shere (the other endorser) or myself or jointly and ascertain what the outcome will be". He does not say that he will not pay or that he will contest any suit. It might very well be that he would want a judgment obtained on the note so that when he paid it he could hold Shere on the judgment.

> "Any acknowledgment of the existence of an outstanding debt, where there are no circumstances indicating a purpose not to pay it, is sufficient to raise a new promise and remove the statute bar."
>
> 1 Wood on Limitation, p. 376, p. 388.

In defendant's letter of October 4, 1919 (trans. p. 62, Exception No. 15) he again speaks of the note and asks that suit be brought" in order to determine just what my liability is". This is again an acknowldgement. He does not deny the existence of the note nor does he deny liability.

The note matured March 22, 1916, and the four year limitation of the statute expired March 22, 1920.

C. C. P., Sec. 337.

In defendant's letter of July 22, 1920 (trans. p. 64, Exception No. 16) he says "Since receiving your letter of June 26 in regard to the White Store notes which I endorsed"—and follows "my attorneys here have advised me to let the matter go to suit as in that way my legal rights will be fully protected in the matter".

In Baillie v. Sibbald, 15 Ves. 185, a plea of the statute was overruled upon letters from the defendant to the plaintiff assigning reasons for declining to pay, and recommending the plaintiff to bring an action, which was considered as amounting to an acknowledging of the debt sufficiently to take the case out of the statute.

Wood on Limitation (4th Ed.), Sec. 64 says:

> "1st. The acknowledgment must be in terms sufficient to warrant the inference of a promise to pay the debt.
>
> 2nd. It must be made to the proper person.
>
> 3rd. It must be made by the proper person.
>
> 4th. It must be made with the proper formalities where they are required by statute."

We have shown,

1st. That the acknowledgment here was in terms sufficient to warrant the inference of a promise to pay the note.

2nd. That it was made to plaintiff.

3rd. That it was made by defendant.

4th. That it was made in writing in conformity with the requirements of the statute.

> "It is not necessary that the writing should expressly admit that the debt is unpaid but it is enough if it clearly and unequivocally refers to the note."
>
> Will v. Marker, 98 N. W. 487 (Iowa).

> "An admission fairly deducible from the conduct of the debtor that there is a sum due which he is liable and willing to pay is sufficient."
>
> 25 Cyc. 1338;
>
> Woodbury v. Woodbury, 90 Am. Dec. 555 (N. H.);
>
> Bean v. Wheatley, 13 App. Cas. D. C. 473.

It has been held that a clear and express acknowldgment of the debt will be sufficient to toll the statute even though it is accompanied by a refusal to pay the debt.

> Elder v. Dyer, 40 Am. Rep. 320 (Kan.);
>
> Murray v. Coster, 11 Am. Dec. 333 (N. Y.);
>
> Lee v. Perry, 15 Am. Dec. 650 (S. C.); 102 Am. St. Rep. 767, note.

In the letter of Aug. 8, 1919, defendant asks plaintiff to get ½ from Shere, the other indorser. He doesn't say that he will not pay unless Shere pays ½. This letter in connection with the others shows a definite acknowledgment. The suggestion that Shere be asked to pay ½ comes at the end of the

letter in a separate paragraph. If this letter stood by itself and was the only letter written by defendant it might not be held sufficient but in connection with the whole correspondence it certainly shows an acknowledgment. And the suggestion to get Shere to pay ½ comes at the end of a long letter in which he first acknowledges the debt and then goes on to say that he has lost considerable money in the White Stores matter and finally to end the letter makes the suggestion that ½ be gotten from Shere. This suggestion is entirely disconnected from the rest of the letter and the acknowledgment is not made in connection with the suggestion but entirely apart from it.

> "When the promise is evidenced by letters, all of the letters relating to the debt, although they are separated by a considerable period of time, may be taken into consideration in determining whether a new promise was made."
>
> 25 Cyc., 1353.

> "We are unable to see why all these letters may not be looked to, and if in any of them, or all of them, there is sufficient language from which a clear unqualified promise to pay the debt may be found, such promise could be given effect, and the appellant be bound thereby, as all of the letters were the writings of the appellant."
>
> Walker v. Freeman, 70 N. E. 595, at p. 598 (Ill.).

So here, if the letters are looked to, it will be seen that the correspondence referred to this note and to means of paying it and nowhere can there

be found a repudiation of any liability. Defendant repeatedly admitted his liability and the law, from that, implies a promise to pay.

The following are some examples of what have been held to be sufficient acknowledgments.

"I am ashamed the account has stood so long."

Comforth v. Smithard, 5 H. & N. 13.

"I hope to be in Hampshire very soon and I trust every thing will be arranged with W (the creditor) agreeable to her wishes."

Edwards v. Goater, 15 Beav. 415.

"Defendant said the note 'That he had signed the same with his son and that in the end he thought he should have to pay'."

Phelps v. Wuson, 26 Vt. 30.

"I expect to have my father's property turned over to me in a few days but it has not come yet—just as soon as I can get it I intend to settle with your father. I am very sorry that I am unable to do so now. (Signed) A. C. Saunders." Held to be sufficient acknowledgment.

Mowry v. Saunders Ann. Cas., 1913 A. 1348 (R. I.).

"Letters written by a debtor to his creditor, acknowledging an indebtedness but declaring his inability to pay are sufficient to overcome the statute."

Bloom v. Kern, 30 La. Ann. 1263.

"There is required either an express promise to pay the debt or an absolute admission of indebtedness from which a promise to pay may naturally be inferred"—"A clear admission of

the debt being evidence, if unrebutted, of a new promise to pay sufficient to avoid the statute."

Wood on Limitation, Sec. 68.

IV.

DEFENDANT BY HIS CONDUCT AS SHOWN BY HIS LETTERS IS ESTOPPED FROM SETTING UP THE STATUTE OF LIMITATIONS.

Phillips v. Phillips, 163 Cal. 53;
Quanchi v. Ben Lomand Wine Co., 17 Cal. App. 565;
State Loan v. Cochrane, 139 Cal. 245;
Daniel v. Daniel, 3 Cal. App. 294;
Smith v. Lawrence, 38 Cal. 24;
Randon v. Toby, 11 How. 493;
Smith v. Dupree, 140 S. W. 367 (Texas);
Pollak v. Billings, 32 So. 639;
Wells Fargo v. Enright, 127 Cal. 669;
17 Rul. Cas. Law, p. 884;
Schroeder v. Young, 161 U. S. 334 at p. 344;
Missouri K. & T. v. Pratt, 85 Pac. 141;
25 Cyc. 1016.

As we pointed out these requests for indulgence were made at a time when the statute would not have availed defendant had he been sued. The delay was had at his request. Had he repudiated all liability suit would have been brought but he kept asking for time without repudiating his liability and in that way prevented plaintiff from acting when he could and would, had it not been for defendants repeated

requests for delay. He should not be allowed to plead the statute under such circumstances.

> "Aside from the estoppel arising out of an express waiver of the defense of the statute or of the promise not to plead it, the defendant may be estopped to avail himself of the statute by his conduct, where such conduct, though not amounting to a distinct waiver, and though not constituting such fraud as will work a postponement of the statute under the general rule of fraud and concealment has yet been such as directly to lead the plaintiff to delay bringing suit until the statutory period has elapsed. In such cases the equity rule that no man may take advantage of his own wrong may be invoked to preclude the defendant from availing himself of the defense of the statute."
>
> 19 Am. & Eng. 2nd Ed. 288.

CONCLUSION.

Defendant was a surety on the note. Prior to the tolling of the statute he wrote seven letters to plaintiff in response to demands for the payment of the note. In no one of those letters is there contained any repudiation of the obligation. In each of them he acknowledges the debt. He was endeavoring to obtain sufficient dividends from the bankrupt estate of the principal to wipe out his obligation and repeatedly wrote that he was awaiting information regarding disbursements by the trustee. These requests for delay were made at a time, before the statute had tolled, and when he could have been forced to pay. The delay was oc-

casioned at his request for his benefit. If he at any time had repudiated the obligation plaintiff could have proceeded at once to enforce it. The course of the correspondence shows that he was continually reminded of the fact that the debt was overdue and that he did not deny this but sought for time. All of which raised an implied promise to pay.

In addition to the several acknowledgments of the debt his conduct was such that he was estopped from setting up the statute of limitations.

The judgment for defendant should be reversed.

Dated, San Francisco,
May 1, 1922.

Respectfully submitted,

WILLARD P. SMITH,
MARK J. WOOLEY,
Attorneys for Plaintiff in Error.